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IN THE

Supreme Court of the United States

OCTOBER TERM 1939

No. 329

HENRY RUSSELL, LAWRENCE MILLER, CHARLES STEERS and JOHN P. WING, co-partners doing business under the firm name of RUSSELL, MILLER & CAREY, and SAMUEL A. PLEASANTS,

Petitioners,

against

JAMES S. TODD, JOSEPH R. WORK and WILLARD C. WEISS, co-partners doing business under the firm name of J. S. TODD & Co., on behalf of themselves and all other creditors of THE OHIO JOINT STOCK LAND BANK OF CINCINNATI, OHIO,

Respondents,

and

HOWARD Y. LISSENDEN, HENRY TRUXTON EMERSON, WILLARD C. WEISS and ALEX LOWENTHAL, as Members of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, Creditors' Protective Committee,

Intervenors-Respondents.

PETITION FOR REHEARING

RALPH M. CARSON
SAMUEL A. PLEASANTS
Counsel for Petitioners

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PETITION FOR REHEARING

Upon the record, the opinion of this Court rendered February 26, 1940 (now reported in 84 L. Ed. Adv. Op. 517), and the decision of the New York Court of Appeals in *Mencher v. Richards* rendered May 28, 1940 (not yet

officially reported), petitioners pray for reargument herein and for a stay of mandate under the prior decision of this Court until such reargument has been had.

Upon our prior petition dated March 21, 1940, showing the pending appeal in *Mencher* v. *Richards*, this Court on March 25th made an order staying the mandate and extending until May 15th the time to petition for reargument. As the earliest opinion day of the New York Court of Appeals following the session in which argument of the appeal in *Mencher* v. *Richards* was had, was May 28th, this Court on May 8th extended until May 29th the time under its prior order. On May 28th the Court of Appeals reversed the determination in *Mencher* v. *Richards*. This opinion is reprinted as Appendix A to this petition.

1. NATURE OF THE ACTION

This is a representative action in equity, instituted in the District Court for the Southern District of New York on December 16, 1931, by creditors of a Federal joint stock land bank to enforce the statutory liability imposed upon the defendant shareholders of that bank, petitioners in this Court, by 12 U. S. Code § 812. The cause of action accrued in April 1928 (R. 354).

Judgment for plaintiffs in the District Court was affirmed by the Circuit Court of Appeals, 104 F. (2d) 169, and certiorari was granted by this Court on October 16, 1939 (308 U. S. 541, R. 437), limited to the question of the application of the New York statute of limitations.

The opinion of this Court, written by Mr. Justice Stone, affirmed the decisions below. Mr. Justice Roberts dissented. Mr. Justice Murphy did not participate.

2. BASIS OF PRIOR DECISION HEREIN

The prior decision of this Court, 84 L. Ed. Adv. Op. 517, holds that the action is one of exclusively equitable cognizance, but that nevertheless the New York statute of limitations will be applied thereto in equity if it appears with reasonable certainty that there is a State statute applicable to like causes of action (pp. 523-4).

With reference to the statute of limitations to be applied, petitioners argued for the three-year statute, Civil Practice Act § 49 subd. 4, establishing that limitation for actions against stockholders of a money corporation or banking association to enforce a liability created by statute. Respondents urged the applicability of the ten-year statute, Civil Practice Act § 53, establishing a ten-year limitation for causes of action for which no limitation is specifically prescribed.

This Court deemed the ten-year statute to be that probably applicable under the New York law. The opinion pointed out (pp. 522-3) that the precise question appeared not to have been decided by the New York Court of Appeals, and in the absence of a controlling decision by that Court relied upon language of the Appellate Division, Second Department, in *Mencher* v. *Richards*, 256 A. D. 280, which the Court deemed to be supported by reasoning of the Court of Appeals in *Hanover Fire Insurance Co.* v. *Morse Dry Dock & Repair Co.*, 270 N. Y. 86, and *Potter* v. *Walker*, 276 N. Y. 15.

3. GROUNDS ON WHICH REHEARING IS SOUGHT

In view of the decision just rendered by the New York Court of Appeals in *Mencher* v. *Richards*, it is submitted

that reargument should be had for the purpose of allowing adequate opportunity to present the law of New York on the subject of limitations, which the prior opinion of this Court for the first time held to be controlling in a Federal equity action. With only such detail as Rule 33 permits, we respectfully urge:

(a) *Mencher* v. *Richards*

From the prior opinion it would appear that the primary reliance of the Court in its conclusion with respect to the New York law of limitations was the decision rendered by the Appellate Division Second Department on February 17, 1939, in *Mencher* v. *Richards,* 256 A. D. 280, as to which the same Court denied leave to appeal to the Court of Appeals, 256 A. D. 1003. This was a stockholder's action against directors of a moneyed corporation; the defendants were charged with negligence and in certain transactions with the receipt of personal profits. The ruling of the Appellate Division on which this Court relied, was rendered on cross-motions to strike defenses and portions of the complaint, which involved the question of the applicable period of limitations. The Appellate Division at that time held that the three-year statute applied to all of the complaint except those causes of action charging the receipt of personal profits, as to which they held the ten-year statute to apply under the authority of *Potter* v. *Walker,* 276 N. Y. 15.

The appeal to the Court of Appeals which occasions the present petition for reargument was allowed only after the argument had been had in this case. The opinion of the Court of Appeals, Appendix A hereto, was of course

rendered after the decision herein. The order appealed from was not that just described, but a subsequent order made by the Appellate Division Second Department on a motion to examine defendants before trial, which also concerned the question of the applicable period of limitations. The causes of action involved were the common law causes, not the equitable causes. Plaintiff-appellant, however, contended in his brief in the Court of Appeals that the entire complaint was equitable in character because the relief demanded was essentially for a mandatory injunction to dispose of illegal investments (brief pp. 16-7). The Appellate Division Second Department had held, 258 A. D. 925, that no examination should be permitted as to certain common law transactions complained of, because these would be barred by the six-year statute of limitations. The Court of Appeals on May 28th reversed this determination and held that as a matter of law the three-year statute of limitations, Civil Practice Act § 49 subd. 4, exclusively governs the causes of action in question.

In the Court of Appeals briefs were submitted not only by the parties to the appeal but by *amici curiae* including ourselves, attorneys representing stockholders of Southern Minnesota Joint Stock Land Bank, and attorneys representing creditors of Southern Minnesota Joint Stock Land Bank. Our brief set forth in full as an appendix the opinion of this Court in *Russell* v. *Todd*. Plaintiff-appellant urged upon the Court (brief p. 29) the decision of this Court in *Russell* v. *Todd* and the Appellate Divison opinion in *Mencher* v. *Richards* as reasons why the ten-year statute should be applied to the *Mencher* case as being an equitable action. He argued on the basis of *Potter* v. *Walker* that his complaint, in demanding a mandatory in-

junction for liquidation of illegal investments and for an accounting of damage, sought relief available only in equity, and said at page 19 of his brief:

> "It is respectfully submitted that complete and adequate relief with respect to the whole complaint can only be obtained in equity, and therefore the ten-year period of limitations applies to this entire complaint."

The Court of Appeals rejected this contention and also held the six-year statute inapplicable to causes of action even within its terms, if asserted against directors of a moneyed corporation. The Court pointed out that the transactions involved on the pending appeal were not alleged to have resulted in profit for the individual defendants. After setting forth the relevant statutes, Civil Practice Act § 48 subd. 3, § 49 subd. 4, and § 53, the opinion of the Court continues:

> "In *Potter* v. *Walker* (276 N. Y. 15) we had before us a stockholder's derivative action against directors of a corporation (which was not a moneyed corporation) and we there held in applying the Statute of Limitations that the action was to be treated in the same way as though the corporation were the plaintiff, and, that if the action was to recover profits which the director had wrongfully received and for which he would be liable to account, it was equitable in nature and subject to the ten-year statute, but, if the action was for damages suffered by the corporation from the negligent action of the director where there had been no participation by him in the receipt of wrongful profits, the six-year statute (as it then was) applied. Here the causes of action are of the latter class and the ten-

year statute is not applicable. The six-year statute is applicable under the authority of the *Retter* case (*supra*) unless the fact that the corporation involved is a moneyed corporation requires a different ruling because of the quoted language of subdivision 4 of section 49. We need not inquire as to the reason for this statutory distinction between cases involving directors of moneyed corporations and those involving directors of other corporations. *The statute is unambiguous and definite. The causes of action here, as to which examinations are sought and have been denied, are the very causes of action which subdivision 4 of section 49 specifies.* It seems clear that that provision is here applicable." (Italics supplied.)

It will be noted that neither in this language nor elsewhere in the opinion does the Court of Appeals expressly repudiate the conclusion of the Appellate Division Second Department in its prior decision (not under review) to the effect that an action against directors of a moneyed corporation to recover personal profits would be governed by the ten-year statute § 53. While it seems to us from the opinion that the Court of Appeals does not share that conclusion, it must be recognized as entirely proper for that Court not to express an opinion on a question not technically before it, as to which leave to appeal had theretofore been denied. However, we submit that the language quoted clearly shows the incorrectness of the prior decision of the Appellate Division to which this Court had reference in its prior decision. In emphasizing the "unambiguous and definite" character of § 49 subd. 4 and pointing out that the causes of action sought to be barred by the six-year statute were "the very causes of action"

specified in § 49 subd. 4, we submit that Judge Sears laid down an unmistakable rule of construction which governs the present case likewise, and governs it if possible more clearly.

If an action against directors of a moneyed corporation to enforce a liability "created by common law" (in the words of the statute) were involved, the question might still be disputed whether a cause of action for recovery of personal profits received, recognized to be an equitable cause of action, is really one at "common law" within the meaning of the statute. The existence of this problem may help to explain why the Court of Appeals did not express its views with reference to the application of the three-year statute to equitable liabilities created by common law; it knew that such equitable claims were set forth in the complaint, yet were not technically before the Court. In the instant case, no such possibility of doubt can exist. There is no room for question that the liability sought to be enforced in this action is one "created by statute", nor can there be diversity of view as to what those words mean. In the instant case, even more than in *Mencher* v. *Richards*, it is plain that Civil Practice Act § 49 subd. 4 is unambiguous and definite and that the cause of action here asserted is the very cause of action which the statute specifies.

This conclusion is reinforced by the succeeding paragraph of Judge Sears' opinion, in which he supports the conclusion by calling attention to the words in the six-year statute, § 48, "except in a case where a different period is expressly prescribed in this article." He remarks that *Mencher* v. *Richards* was indeed an action for injury to property which would be governed by § 48, but also that a different period is expressly prescribed in § 49. He there-

fore determines § 49 to be exclusively applicable because "some force must be given" the exception quoted. In the instant case the ten-year statute which this Court has deemed applicable, § 53, contains a similar exception. It provides that ten years govern actions "the limitation of which is not specifically prescribed in this article." Equally to these words some force must be given. Where a limitation of three years is specifically prescribed in unambiguous and definite language for an action to enforce a liability created by statute with respect to the stockholders of a moneyed corporation, it would seem that the exception in § 53 as well as the plain language of § 49 requires the exclusive application of the three-year statute.

(b) Other Decisions of New York Court of Appeals

One reason why the Court of Appeals in the *Mencher* case did not dilate upon the application of the three-year statute of limitations to exclusively equitable actions, may be that as recently as 1923 it held the corresponding phrase in the six-year statute, § 48 subd. 2, to govern an equitable liability. *Shepard Co. v. Taylor Publishing Co.*, 234 N. Y. 465, 468. Section 48 bars generally by six years "an action to recover upon a liability created by statute". The *Shepard* case was an action under Stock Corporation Law § 66 to set aside a chattel mortgage and sale on foreclosure and obtain from the mortgagee an accounting for the property and its proceeds. By virtue of the equitable relief demanded, the Appellate Division Fourth Department held that the six-year statute, despite its terms, did not apply and that the ten-year statute, despite its terms, did apply, 198 A. D. 638. The Court of Appeals, while affirming as

to result, took pains to point out that the period of limitations applicable was six years, not ten years. After quoting Stock Corporation Law § 66, the Court said:

> "We are of the opinion that subdivision 2 of § 382 of the Code of Civil Procedure [now Civil Practice Act § 48 subd. 2], which provides a six-year limitation for an action to recover upon a liability created by statute, governs this case. The complaint in this action demands judgment that the chattel mortgage and the sale to the defendant Shuart on the foreclosure thereof be declared invalid and void, and that the mortgagee Shuart be directed and compelled to account to the plaintiff for the property obtained by her and the proceeds thereof. The liability of the mortgagee to turn back the property received upon the sale under the void chattel mortgage and to account for the proceeds was a liability created by statute. It did not exist at common law. 'Liability created by statute' means a liability which would not exist but for the statute. (*Hawkins* v. *Iron Valley Furnace Company*, 40 Ohio St. 507, 514)."

In *Brinckerhoff* v. *Bostwick*, 99 N. Y. 185, 191, the Court of Appeals gave some historical analysis of the three-year statute, and enumerated among the statutory liabilities barred thereby provisions for equal and ratable liability of bank stockholders, L. 1882 Ch. 409 § 125 and the like. The consequence of the 1897 amendment of the three-year statute, adding common law liabilities, was stated by the Court in *Gilbert* v. *Ackerman*, 159 N. Y. 118, 122, to be to broaden "the provisions of the section so as to embrace all causes of actions against directors."

The three or four cases indicating that the ten-year statute governs equitable actions (such as *Hanover Fire*

Insurance Company v. *Morse Dry Dock & Repair Co.*, 270 N. Y. 86) were all cases in which the alternative to the ten-year statute was the six-year statute. The six-year statute is more generally worded than the three-year statute. It is not "unambiguous and definite" as is the latter. Conflicts between the ten-year and the six-year statutes typically arose in the field of concurrent jurisdiction of law and equity, which was difficult to delimit. No possibility of concurrent jurisdiction exists as between the three-year and the ten-year statutes. Not only is the three-year statute unambiguous and definite, but the ten-year provision is expressed to apply only to causes of action for which no specific prescription is made. Hence decisions construing the ten-year statute in connection with the six-year statute have little or no bearing on the present question of the application of the three-year statute.

The fact that an accounting is demanded and required in the instant case does not compel application of the ten-year statute. *Shepard Co.* v. *Taylor Publishing Co.*, 234 N. Y. 465, 468; *Cwerdinski* v. *Bent*, 256 A. D. 612, affirmed 281 N. Y. 782; *Mason* v. *Henry*, 152 N. Y. 529; *Welles* v. *Yates*, 44 N. Y. 525, 534.

(c) Legislative History

As a matter of legislative history it can, we believe, be demonstrated that the statute governing the enforcement of certain liabilities of directors and stockholders of moneyed corporations has always been intended to govern them exclusively; that the statute was special in its origin and has so continued; and that it has always constituted an exception to the New York law of limitations.

The demonstration of this point requires quotations from the New York statutes running back to 1830, somewhat more extensive than would be appropriate in a petition for rehearing. Briefly it may be said that the three-year period of limitations takes its origin in a six-year period provided for suits against stockholders and directors of moneyed corporations by the Revised Statutes of 1830, Title II, Part III, Article Fourth, § 44. This section *specifically excluded* from the general law of limitations suits of the character described. On the other hand the same Revised Statutes contain the genesis of the present ten-year limitation in Article Sixth, §§ 49-52. These sections prescribed a ten-year period for exclusively equitable causes and applied the common law limitation to causes of which equity had concurrent jurisdiction.

From the beginning in 1830, therefore, it was plain that the limitation provided for actions against stockholders of moneyed corporations did not participate in the general law of limitations of which the ten-year statute was part. From that date the two different provisions follow a parallel but separate course. The ten-year statute took substantially its present form in the Field Code of 1848, and continued through the Code of Civil Procedure (1876) into the Civil Practice Act (1921). The ten-year statute was always expressed as a residual statute providing for cases not specifically provided for. On the other hand the cases of stockholders of moneyed corporations continued to be specifically provided for by a six-year limitation in the Field Code and in the Code of Civil Procedure. This became a three-year limitation in 1877, and was broadened by the addition of common law liability in 1897, at which time

it acquired substantially the form now appearing in the Civil Practice Act.

We believe that consideration of this legislative history will, in conjunction with the decided cases, make it entirely clear that the law of New York requires the application of the three-year statute to the instant cause of action.

CONCLUSION

It is prayed that this cause be set down for re-argument at the earliest convenient session of this Court and that the existing stay of mandate be extended until such re-argument has been had.

Respectfully submitted,

RALPH M. CARSON
SAMUEL A. PLEASANTS
Counsel for Petitioners

May 29, 1940

Certificate Under Rule 38

RALPH M. CARSON, one of the attorneys for the petitioners, certifies that he is a member of the bar of this Court; that he has prepared the foregoing petition and is familiar with all the facts stated therein; and that the foregoing petition is submitted in good faith and not for purposes of delay.

New York, N. Y., May 29, 1940.

RALPH M. CARSON

APPENDIX A

MAX MENCHER, as a Stockholder of the Empire Title & Guarantee Company, Suing on Behalf of Himself and All Others Similarly Situated, Appellant, *v.* EDWARD A. RICHARDS et al., Respondents, and ADAM CHRISTMANN et al., Defendants.

(Decided May 28, 1940.)

APPEAL, by permission, from so much of an order of the Appellate Division of the Supreme Court in the second judicial department, entered December 26, 1939, as affirms an order of Special Term (1) denying a motion by plaintiff for an order directing the defendants Edward A. Richards et al., to appear and be examined before trial as adverse parties with respect to specified items set forth in plaintiff's notice of motion for such examination, and (2) denying plaintiff's motion for a similar order directing the defendant Empire Title & Guarantee Company to appear and be examined before trial as an adverse party with respect to other specified items as set forth in plaintiff's notice of motion for such examination.

The following question was certified: "Was an examination before trial of the defendant Empire Title & Guarantee Company, a moneyed corporation, as to items 9, 10, 11, 12, 13, 18, 19, 20, 21 and 22, and of the individual defendants Richards, Paulson and Ohlau, directors of a moneyed corporation, as to items 2, 3, 4, 5, 6, 11, 12, 13, 14 and 15, set forth in plaintiff's notice of motion, properly denied as matter of law?"

Donald I. Peyser for appellant.

John P. McGrath for Edward A. Richards, Paul Paulson and Charles H. Ohlau, respondents.

Bruce R. Duncan for Empire Title & Guarantee Company, respondent.

SEARS, J. The part of the order which is before us for review denies an examination before trial of the defendant Empire Title & Guarantee Company and certain individual defendants, directors of the Empire Title & Guarantee Company. The result of the appeal depends upon the particular section of the Statute of Limitations applicable to the plaintiff's alleged causes of action to which the examinations relate. The action is a stockholder's derivative action to recover on behalf of the corporate defendant from the individual defendants for losses resulting from illegal investment by the individual defendants of the funds of the corporate defendant. The corporate defendant is concededly a moneyed corporation. The acts which constitute the alleged causes of action occurred in 1929 and 1930 in respect to which the examinations are sought and are not alleged to have resulted in profit for the individual defendants. This action was begun March 3, 1937. The pertinent parts of the three sections of the statute here involved are:

"§ 48 [as it was before amendment, L. 1936, c. 558]. Actions to be commenced within six years. The following actions must be commenced within six years after the cause of action has accrued:

"1. * * *

"2. * * *

"3. An action to recover damages for an injury to property, or a personal injury except in a case where a different period is expressly prescribed in this article.

"§ 49. Actions to be commenced within three years. The following actions must be commenced within three years after the cause of action has accrued:

"1. * * *

"2. * * *

"3. * * *

"4. An action against a director or stockholder of a moneyed corporation, or a banking association, to recover a penalty or forfeiture imposed, or to enforce a liability

created by the common law or by statute. The cause of action is not deemed to have accrued until the discovery by the plaintiff of the facts under which the penalty or forfeiture attached or the liability was created."

"§ 53. Limitation where none specially prescribed. An action, the limitation of which is not specifically prescribed in this article, must be commenced within ten years after the cause of action accrues." (Civ. Prac. Act.)

In *Potter* v. *Walker* (276 N. Y. 15) we had before us a stockholder's derivative action against directors of a corporation (which was not a moneyed corporation) and we there held in applying the Statute of Limitations that the action was to be treated in the same way as though the corporation were the plaintiff, and, that if the action was to recover profits which the director had wrongfully received and for which he would be liable to account, it was equitable in nature and subject to the ten-year statute, but, if the action was for damages suffered by the corporation from the negligent action of the director where there had been no participation by him in the receipt of wrongful profits, the six-year statute (as it then was) applied. Here the causes of action are of the latter class and the ten-year statute is not applicable. The six-year statute is applicable under the authority of the *Potter* case (*supra*) unless the fact that the corporation involved is a moneyed corporation requires a different ruling because of the quoted language of subdivision 4 of section 49. We need not inquire as to the reason for this statutory distinction between cases involving directors of moneyed corporations and those involving directors of other corporations. The statute is unambiguous and definite. The causes of action here, as to which examinations are sought and have been denied, are the very causes of action which subdivision 4 of section 49 specifies. It seems clear that that provision is here applicable.

The respondents urge, however, that even though subdivision 4 of section 49 is applicable, subdivision 1 of section 48 (the six-year statute) is also applicable and that the two

provisions must be construed together so that in any event, even though the facts under which the liability was created were not discovered, the Statute of Limitations would have run at the expiration of six years. We do not so read the statutes. Some force must be given the words in the six-year statute, section 48, "*except in a case where a different period is expressly prescribed in this article.*" While the action here is to be looked at as one for an injury to property, a different period is expressly prescribed in subdivision 4 of section 49. Further, neither in section 49 nor in section 53, the two sections providing that the statute runs only from discovery of the facts, is there any limitation upon the time of the discovery, nor is it easily understood why there should be. In 1936 (L. 1936, ch. 558) the six-year period of limitation contained in section 48 was reduced to a three-year period. (See § 49, subd. 7, as now in effect.) If section 48 after the amendment continued to limit subdivision 4 of section 49 it would manifestly make the provisions of subdivision 4 of section 49 nugatory and a general three-year limitation would prevail irrespective of the time of discovery.

For these reasons we conclude that subdivision 4 of section 49 is the only Statute of Limitation here applicable, and, as it does not appear what was the date of the discovery of the facts under which the liability was created, the examination should not have been denied as matter of law.

The order, so far as appealed from, should be reversed, with costs, and the certified question answered in the negative.

LOUGHRAN, FINCH, RIPPEY and LEWIS, JJ., concur; LEHMAN, Ch. J., and CONWAY, J., taking no part.

Order reversed, etc.